IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 162 OF 2005

Bhagwanlal Durgaram Kandi
(deceased through LRs.)
Smt.Lilawati B.Kandi & ors. ... Appellants.

Versus.

Smt.Padmaja Vishnu Retharekar
and others. ... Respondents.

Shri A.M.Kulkarni for the Appellants.

Shri S.G.Deshmukh for the Respondents Nos.1 to 3.

CORAM : ABHAY S. OKA, J.

DATED : 6th May, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. Submissions were heard on 28th April 2005 and today the Appeal is kept for orders. The Appellants are the legal representatives of the original Plaintiff. The suit was filed by the original Plaintiff for permanent injunction restraining the Respondents/Defendants from making any construction affecting the disputed common wall and from closing the windows in the common wall. The trial Court held that the original Plaintiff has failed to prove that the Respondents were trying to construct the new wall on the common wall. The learned trial Judge however granted declaration in the counter claim filed by the Respondents. As a consequence of finding on issue No.1 regarding the failure of the original Plaintiff to prove that the Defendants were trying to

construct a new wall on the common wall, the suit filed by the original Plaintiff was dismissed. In the counter claim, declaration was granted that the original Plaintiff has no right to use the nine windows on the western side of the first and second floors of his house bearing City Survey Nos.1096 and 1096/1. Mandatory injunction was granted directing the Plaintiffs to close the windows.

2. The first Appellate Court has dismissed the Appeal preferred by the legal representatives of the original Plaintiff.

3. The learned Advocate appearing for the Appellant submitted that both the Courts below have failed to appreciate in proper perspective the concept of easmentary rights. He submitted that the original Plaintiff has constructed the building which is adjacent to the common wall as per the permission granted by the Municipal Council and therefore, the Respondents/Defendants had no right to obstruct the user of the windows by the Appellants. He submitted that a wall is constructed without touching the common wall and the Respondents can construct wall in their property while erecting a building on their own property. The learned Counsel appearing for the Respondents has supported the impugned Judgment and Decree.

4. Both the Courts below have held that the original Plaintiff has failed to prove that he has acquired easmentary right by prescription for having air and light through the 9 windows on the western side of the building. Admittedly under permission granted by the Municipal Council, the original Plaintiff was not permitted to have windows on the wall. The finding of fact on the issue of easmentary rights is based on legal evidence on record. No interference is warranted in the Second Appeal as the findings are not shown to be perverse. No substantial question of law arises. The Second Appeal is dismissed with no order as to costs.

4. At this stage the learned Counsel appearing for the Appellants prays that the decree for mandatory injunction may be stayed. Considering the facts and circumstances of the case, the decree for mandatory injunction is stayed for a period of two months from today.

Judge.